

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

TESTAMENTARY SUIT NO. 92 OF 1997

IN

TESTAMENTARY PETITION NO. 812 OF 1997

(This order is corrected as per speaking to the minutes of the order dated 23rd January, 2024)

Sainath Dattatraya Jadhav

...Plaintiff

Versus

Dr. Mala Bhimrao Patil
(since deceased) & Ors.

...Defendants

WITH

INTERIM APPLICATION (LODGING) NO. 30326 OF 2023

WITH

INTERIM APPLICATION NO. 2285 OF 2023

IN

TESTAMENTARY SUIT NO. 92 OF 1997

WITH

SUIT NO. 2165 OF 1996

WITH

TESTAMENTARY PETITION NO. 192 OF 1997

WITH

SUIT NO. 192 OF 2007

* * *

- Mr. Rashid Khan and Ms. Priyanka Kothari i/b Ms. Sumit Soman, for Plaintiff.
- Ms. Swati Sawant a/w Ms. Vidya Mangavde, for Defendant No. 2(a).

* * *

CORAM : MANISH PITALE, J

DATE : 12th JANUARY, 2024.

P. C. :

1. Oath is administered.

D.W.1 : Mr.Rahul Suresh Jadhav

Age : 45 years

Address : 101, Dharati, J.P. Road, Varsova, Andheri (W)
Mumbai - 69.

Examination-in-chief of D.W.1 on S.A.

SHRIKANT
SHRINIVAS
MALANI

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SHRIKANT
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MALANI
Date: 2024.01.24
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I have filed affidavit in lieu of examination-in-chief dated 11th July, 2023. I have signed at the foot of the said affidavit and I identify my signature. I affirm that whatever stated in the said affidavit is true to my knowledge and it is correct. It was prepared under my instructions.

2. The witness is discharged.

3. The affidavit in lieu of examination-in-chief dated 11th July, 2023 of aforesaid witness is taken on record and marked D.W.1.

4. Alongwith the affidavit in lieu of evidence of defendant No. 2(a), three documents are placed on record for being marked as exhibits.

5. As regards document at serial No.1, it is a copy of Commissioners' Report dated 20th / 21st October, 1995. There is no serious objection raised to the same and hence, the same is taken on record and marked as Exhibit "D-1".

6. At serial No. 3 in the list of documents, is a copy of a legal notice dated 05th August, 1996, issued to the Co-operative Housing Society. The original would be with the office of the society. There is no serious objection to marking the aforesaid document as an exhibit. Hence, the said document is taken on record and marked as Exhibit

“D-2”.

7. As regards the document at serial No. 2, which is purportedly to be a copy of a will dated 25th May, 1991, executed by the deceased, serious objection is raised on behalf of the plaintiff. Attention of this Court is invited to paragraph No. 20 of the affidavit in lieu of evidence of the witness, wherein it is stated that the grandfather of the witness purportedly executed the said Will dated 25th May, 1991 and it is further stated that the father of the witness had taken a photocopy of the aforesaid Will by mechanical process and it is claimed that the same is an exact copy of the original. It is further stated that the original is not traceable.

8. In this context, an application is also moved on behalf of the defendants bearing Interim Application (Lodging) No. 30326 of 2023, for leading secondary evidence in the context of the aforesaid document. In the said application, it is stated that the applicant recollected that his father had informed the applicant that his uncle one Dilip Jadhav had shown the original Will dated 25th May, 1991 to his father and that the applicant's father in turn had photocopied the same by mechanical process.

9. A perusal of Section 63 of the Indian Evidence Act, 1872, particularly illustration (d) thereof would show such a document

cannot qualify for secondary evidence of the original. The statements made in the affidavit in lieu of evidence of the witness and the aforesaid application for leading secondary evidence amount to nothing but an oral account of a copy allegedly compared with the original. Therefore, this Court is not convinced that either the aforesaid application for permission to lead secondary evidence can be granted or that the said document can be marked as exhibit in the facts and circumstances of the present case. The objection raised on behalf of the plaintiff in respect of the said document is accepted and the prayer made on behalf of the defendants in that context is rejected.

10. In view of the above, Interim Application (Lodging) No. 30326 of 2023, is dismissed.

11. In the light of documents being marked and affidavit in lieu of examination-in-chief of the defendant being taken on record, it would be appropriate that a commissioner is appointed for cross examination of the defendant.

12. In that light, Mr. Yashodeep P. Deshmukh, learned counsel practicing in this Court is appointed as a Court Commissioner for recording evidence of the defendant. The details of Court Commissioner are as follows :

Mr. Yashodeep P. Deshmukh,
210, 2nd Floor, Commence House,
Kalaghoda, Mumbai - 23.
Mob. No. 7738520325 / 8080519024
Email : ypdchambers@gmail.com

13. He is requested to complete the further examination-in-chief (if any) and cross examination of witness at his convenience.

- (a) The Commissioner is at liberty to exercise discretion under Order XVIII Rule 4(4) of the Code of Civil Procedure, 1908, to note the demeanour of the witness where necessary.
- (b) Further examination-in-chief of any witness is to be permitted before the Commissioner before cross examination commences.
- (c) All further examination-in-chief and cross examination shall be conducted strictly in question and answer form.
- (d) The commissioner is permitted, with the consent of the plaintiff, to conduct the cross examination through video conferencing. The original audio-visual recording will be submitted alongwith the Commissioner's report to be registry.
- (e) Liberty to the parties as also to the commissioner to apply in case of difficulty.
- (f) All re-examination will be conducted only in Court.
- (g) Costs of the commission shall be borne by defendant No.2(a) and the plaintiff..
- (h) The commissioner is not to permit any applications for adjournment on dates previously fixed, except

where absolutely unavoidable. Counsel's inconvenience or unavailability does not constitute such unavailability.

- (i) The defendant No.2(a) and the plaintiff shall pay costs of Rs. 500/- per hearing to the Court Clerk, who attends the commission with the court papers. This is required since these clerks attend the commission in addition to their duties and outside their normal working hours..

14. The Court Commissioner is required to submit report within six weeks from today.

15. List the proceedings for further consideration on **08th March, 2024.**

(MANISH PITALE, J.)